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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 32

JOHN MICHEL, *Petitioner*

v.

STATE OF LOUISIANA, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

May It Please the Court:

Statement of the Case

John Michel, a young negro male, petitioner herein, was indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, with having, on February 10, 1953, committed the crime of aggravated rape on a young white female. The indictment was returned on February 19, 1953. (T. p. 11)

Aggravated rape, defined by R.S. 14:42 (*Infra* p. *i.*) is a capital crime in the State of Louisiana.

On Monday, February 23, 1953, John Michel was brought before the bar of the Criminal District Court for the Parish of Orleans, State of Louisiana, for arraignment, and not being represented by counsel, his arraignment was continued until Monday, March 2, 1953, or one week later.

On this date, John Michel was brought back before the bar of the Court and, while some question exists as to

exactly what took place, the Record shows that Gerard H. Schreiber, Esquire, was appointed by the court to represent the defendant, and his arraignment continued for another week, or until Monday, March 9, 1953.

Reference to Bill of Exceptions No. 1 (T. p. 30), and the testimony made a part of this bill, will explain what took place in Court on March 2, 1953, and the misunderstanding that arose thereby.

Coincidentally, on this very same day, the term of the Grand Jury expired.

On March 9, 1953, the date to which the arraignment had been continued, the fifth judicial day following the expiration of the term of the Grand Jury, John Michel was again brought before the bar of the court, at which time *before answering to the indictment*, through Mr. Schreiber and George H. Fust, Esquire, he filed a motion to quash the indictment on the following grounds:

> 1. That he is a negro.
> 2. That there were no negroes on the Grand Jury that indicted him, having been unlawfully and unconstitutionally systematically excluded therefrom since time immensurable. (T. p. 16)

On March 23, 1953, the state demurred to petitioner's motion to quash on the grounds that it had been filed more than three judicial days after the expiration of the Grand Jury term thereby, *allegedly* being contrary to the provisions of L.R.S. 15:202. (*Infra* p. *i.*)

On March 30, 1953, through counsel, your petitioner filed an answer to the state's demurrer in which he set out *in particularity* the multitudinous facts pertinent to his motion to quash. (T. p. 18)

On April 8, 1953, the trial court sustained the state's demurrer and overruled the defendant's motion to quash (T.

p. 18), to which ruling the defendant properly and timely reserved a bill of exceptions (T. p. 30), and filed a motion to perpetuate the testimony in support of the motion to quash (T. p. 21) which was also overruled (T. p. 21) and another bill of exception properly and timely reserved. (T. p. 39)

On May 28, 1953, your petitioner was found guilty as charged and remanded to await sentence. (T. p. 14)

On July 6, 1953, your petitioner filed motions for a new trial (T. 22) and in arrest of judgment (T. 23) both of which were overruled by the Court and bills of exceptions properly and timely reserved (T. 41 and T. 44), and on November 2, 1953 filed a supplemental motion for a new trial (T. 24) which was also overruled and a bill of exceptions similarly reserved. (T. 43)

On November 9, 1953, your petitioner was sentenced to death by electrocution (T. p. 15) at which time counsel filed a motion for suspensive appeal, (T. 29)

On May 31, 1954, the Supreme Court of the State of Louisiana rendered an opinion affirming your petitioner's conviction and sentence (T. 45) which was followed by a motion for a rehearing filed by your petitioner (T. 58), which was refused on July 2, 1954.

Your petitioner has applied to this Honorable Court for writs of certiorari which were granted. (T. 64)

Questions Presented For Review

A state statute provided that attacks on a jury venire had to be filed before the expiration of the third judicial day *of* the term for which the venire was drawn. For more than fifty years, a person indicted after this time had until his arraignment or trial to attack the venire. In 1943, the State Supreme Court interpreted this language to mean before the expiration of the third judicial day *following*

the term. A Negro male indicted for a capital crime moved to quash his indictment on the grounds that it had been returned by an all white grand jury from which negroes had been systematically excluded. He was prevented from doing so by the invoking of the Supreme Court's interpretation of 1943.

1. Has he been denied due process of law?
2. Was this "interpretation" of 1943 "judicial legislation" rather than "judicial interpretation"?
3. Is a state statute, the arbitrary and unreasonable interpretation of which deprives a defendant of his right to prove a prima facie case of unlawful discrimination in the qualification of jurors who were disqualified because of race, creed, or previous condition of servitude, constitutional?

Argument

May It Please the Court:

John Michel, petitioner herein, a colored male, was indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, and convicted capitally for the rape of a white woman.

More than 32% or some 250,000 of the population of Orleans Parish is colored.

Including the Grand Jury that indicted petitioner, within the memory of no living man, has a colored person ever been selected as a Grand Juror in Orleans Parish with a single exception in 1936, when a Judge of the Criminal District Court for the Parish of Orleans, selected one R. J. Walker, a colored man who looked like a white man, as a Grand Juror, under the mistaken idea that Walker was a white man. This fact has been proven judicially on several occasions in other cases. Walker is still living and so testified.

Before his arraignment, and before pleading to the merits, as he should have done according to the repeated rulings of this Honorable Court, petitioner properly moved to quash the indictment on the grounds that the Grand Jury that returned said indictment was selected and empaneled in violation of the Fourteenth Amendment and the Civil Rights Act of the United States.

Petitioner then and there stood ready to prove the facts hereinabove stated and also that in Orleans Parish there are many thousands of colored persons qualified for Grand Jury service as borne out by the fact that there are two colored universities in the City of New Orleans, one of which has been in existence since 1869; that approximately 40% of the enrollment of the public, private and parochial schools are colored children; that there are countless numbers of colored lawyers, physicians, business executives, school teachers, and dentists; and that there have been colored persons serving on federal Grand Juries in New Orleans for many years. (T. 18)

The trial court ruled that petitioner could offer no proof whatsoever of such flagrant, persistent, and systematic discrimination against colored citizens because of their race and color in the selection of grand jurors in Orleans Parish, and overruled petitioner's motion to quash. (T. 18) Petitioner timely and properly reserved a bill of exceptions to the ruling, (T. 30) and further moved to perpetuate the testimony in support of his motion to quash which was also denied. (T. p. 21)

On appeal, the Supreme Court of Louisiana sustained this ruling of the trial court. *State* v. *Michel*, 225 La. 1040, 74 So. 2d. 207.

Petitioner then applied to this Honorable Court for writs which were granted.

The trial court's ruling was based upon the decision of

the Supreme Court of Louisiana in *State* v. *Wilson*, 204 La. 24, 14 So. 2d. 873. The ruling of the trial court was that one of the two counsel appointed to represent petitioner herein was appointed on March 2, 1953, the date of the expiration of the term of the Grand Jury that indicted petitioner;

That under the "interpretation" of a Louisiana Statute, L.R.S. 15:202, by the Louisiana Supreme Court in *State* v. *Wilson, supra,* petitioner had three judicial days from the date, March 2, 1953, to file the motion to quash but that the motion to quash was not filed until March 9, 1953, the fifth judicial day, which was after the time limit for such motions had expired.

On appeal, the Louisiana Supreme Court sustained the trial court on the precedent and basis of *State* v. *Wilson, supra.*

It is petitioner's contention that *State* v. *Wilson, supra,* and *State* v. *Michel, supra,* are unreasonable, unwarranted and unconstitutional exercises of judicial authority and the decisions and decree of the Supreme Court of Louisiana should be annulled and reversed by this Honorable Court and petitioner granted the right to make his proof in the trial court under his motion to quash.

This cause is concerned primarily with a statute of the Louisiana Legislature, to-wit:—La. Rev. St. Title 15, Section 202, which we will quote in full:

> TIME FOR URGING OBJECTIONS TO ARRAY: WAIVER.
>
> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard, or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon

the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived, and shall not afterwards be urged or heard."

From a reading of said statute, Your Honors will note the following:

(a) "All objections . . . to any juror or jury . . . must be . . . urged before the expiration *of* the third judicial day of the term for which said jury shall have been drawn . . . ".

Respectfully and indubitably "before the expiration of the third judicial day *of* the term for which said jury shall have been drawn", is the third judicial day counting from the beginning of the term.

With all deference to the Louisiana Supreme Court this statute does not say "before the expiration of the third judicial day *following* the term for which the jury had been drawn", as their Honors declared in petitioner's case. *State* v. *Michel, supra*, see p. 1050 of the Louisiana citation. (Italics by the Louisiana Supreme Court).

This declaration of the Honorable Supreme Court of Louisiana in petitioner's case, based on *State* v. *Wilson, supra*, is a material and substantial amendment and revision of the statute that only the State Legislature has power to make. For the judiciary to attempt to make and enforce such a revision of the law upon a litigant is an unconstitutional usurpation of Legislative powers.

"Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning". 82 C.J.S. 322, citing numerous authorities.

From a reading of said statute, your Honors will further note

(b) That this is a TIME STATUTE.

That THE TIME ELEMENT makes it a PHYSICAL IMPOSSIBILITY to apply this statute to a Grand Jury, as the statute is written, except in an extremely limited group of cases, viz; those wherein the indictment is returned within the *first* three days of the term of the Grand Jury.

Remembering, of course, that in Louisiana, a Grand Jury is empaneled for six months, it is evident that the number of indictments that will ordinarily be returned in its first three days of service will be few. Consequently, the one and only reasonable "judicial interpretation" of this statute pertinent to our case is the "interpretation" that since it is a virtual PHYSICAL IMPOSSIBILITY to apply this statute AS WRITTEN to a Grand Jury that the Legislature did not have the Grand Jury in mind when it enacted this statute; that the Legislature was thinking only of a petit jury when it enacted this statute; that this statute therefore has no application to Grand Juries at all but only to petit juries.

Which would mean that there is no statute in Louisiana placing a *time* limit in terms of days upon a motion to challenge the constitutionality of a Grand Jury such as petitioner's motion to quash herein and petitioner's motion to quash was therefore timely filed since it was filed before his arraignment, and before pleading to the merits.

(The expression in the statute "any juror or jury" can readily and reasonably be interpreted to mean any petit jury be it a regular term petit jury or a special term petit jury, rather than to mean "any GRAND jury or juror" as well as "any PETIT jury or juror" as the Louisiana Supreme Court felt in the *Wilson* case, *supra*.)

In order to appreciate how radically and materially the Supreme Court of Louisiana amended and revised this Legislative act, may we indulge in the following analysis:

The law as enacted by the Legislature says:

> "before the expiration of the third judicial day *of* the term for which said (grand) jury shall have been drawn." (Parenthesis added).

In this instance the Grand Jury was empaneled September 2, 1952, and the third judicial day according to the statutory time would be September 5, 1952.

The *Wilson* case, *supra*, changes the dead line time from September 5, 1952, to March 5, 1953, a change of six months in the time.

The legislative statute fixes a limit of THREE JUDICIAL DAYS of the Grand Jury term.

The *Wilson case, supra*, changes the THREE JUDICIAL DAY time limit to ONE HUNDRED JUDICIAL DAYS of the Grand Jury term, or thirty, or sixty, or ninety, or twenty-nine, or ninety-nine days, according to the day of the Grand Jury term that the indictment is returned.

A person indicted by the Grand Jury in question on March 2, 1953, WOULD HAVE THREE JUDICIAL DAYS FOLLOWING the term from March 2, 1953.

A person indicted by this Grand Jury on September 2, 1952, would have ONE HUNDRED AND EIGHTY DAYS or more of the jury term. (Not three as the statute says) to attack the Grand Jury.

Humbly and with all deference petitioner alleges that the Honorable Supreme Court of Louisiana RE-ENACTED (as well as amended and revised) the statute because the State Supreme Court's *State* v. *Wilson, supra*, version of the statute HAS BEEN THE LAW OF LOUISIANA since August 4, 1943, the day that *State* v. *Wilson, supra*, was decided by

that Honorable Court and has been enforced by trial courts in Louisiana and by that Honorable court against all colored indicted persons since, notably, petitioner. *State* v. *Michel*, *supra*. See also, *State* v. *Labat*, 226 La. 201, 75 So. 2d 333, No. of the Docket of this Honorable Court.

A further illustration of the manner in which the Louisiana Supreme Court extended the plain language of Article 202 in their decision in the *Wilson* case, *supra*, is their apparent opinion that, if the defendant is not represented by counsel, the time limitation would not run against him until he was so represented.

Notwithstanding the difference of opinion that arose regarding the time that the attorneys representing your petitioner were so appointed, it must be pointed out that according to the clear and unmistakable language of Article 202, this would have no bearing on the matter, and bears thereon only because of the extension of this article by the Louisiana Supreme Court.

Petitioner respectfully submits that he has pointed out to Your Honors that it is impossible to apply L.R.S. 15:202, As Written and as Enacted by the Legislature, to a Grand Jury, except in a very limited group of cases of which your petitioner is not one, and submits that An Impossible Statute is no statute.

Respectfully, if L.R.S. 15:202 as written and enacted by the Legislature was applicable to the Grand Jury it would not have been necessary for the Louisiana Supreme Court To Make Such a Radical Change in the Time so definitely set out and specified in this time statute; and it would not have been necessary for the Supreme Court of Louisiana to add a condition to the statute, namely, "if the defendant has a lawyer"—

In order to make the statute applicable to a Grand Jury, Your Honors had a situation practically identical before

you in the case of *Carter* v. *Texas*, 177 U.S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

In that case a Texas statute, similar to L.R.S. 15:202, provided that an attack on the Grand Jury had to be made before the Grand Jury was impaneled. When a motion to quash the indictment on the grounds that there has been a systematic exclusion of negroes from the Grand Jury was filed, it was overruled because it was not in limine. Your Honors held that since the crime had been committed after the Grand Jury was impaneled, the defendant had had no chance to challenge the array and was entitled to present this objection.

In other words, the statute as to *Carter* was *impossible* of application.

The conviction of Carter was reversed.

Your petitioner urges that L.R.S. 15:202 as enacted by the Legislature is equally impossible in its application to him, and that its application was only made possible by its having been *judicially* amended in a substantial, material and radical manner.

Petitioner respectfully urges that it is not L.R.S. 15:202 which gives a defendant who commits a crime four months after the term of the Grand Jury has commenced an opportunity to attack the Grand Jury that indicted him—

It is the Louisiana Supreme Court's amendment and revision of the Article which gives him that opportunity in Louisiana. And this amendment and revision by the Supreme Court of Louisiana respectfully is an unconstitutional exercise of judicial authority which means that we must return to the Article as written and as enacted.

If so applied, it can be held only to be impossible of application to your petitioner's case, and having been so applied, to have been unconstitutional.

And further, *State* v. *Wilson*, *supra*, was enforced against

petitioner herein to deprive him of his right to prove by public and undeniable proof that the Grand Jury that indicted him was selected in violation of his right and the right of every colored person in Orleans Parish to the equal protection of the laws in the selection of this Grand Jury (and all prior Grand Juries for more than half a century).

With due deference to the Honorable Louisiana Supreme Court, your petitioner submits that they made a great mistake when they decided in the *Wilson* case, *supra*, that L.R.S. 15:202 had the same application to Grand Juries as it did to petit juries, and that the words "the third judicial day of the term" meant "the third judicial day *following* the term".

Prior to the *Wilson* case, on numerous occasions, attacks had been on Grand Jury venires as well as petit jury venires. The provisions of L.R.S. 15:202 had been invoked to many of them.

As said by the Chief Justice in his dissenting opinion:

> "Heretofore this Court has held consistently that the expression 'before the expiration of the third judicial day of the term for which said jury shall have been drawn' means before the end of the third judicial day counting from the beginning of the term—not from the expiration of the term. . ." *State* v. *Wilson*, *supra*, p. 885.

Under this long line of jurisprudence, an attack on a petit jury venire had to be made before the expiration of the third judicial day from the beginning of the term. An attack on the Grand Jury venire had to be made within the first three days if the indictment was returned within the first three days, otherwise it had to be made before arraignment or before trial of the case. L.R.S. 15:284, *et seq.*

Since the *Wilson* case was decided no one has known precisely when their objections had to be filed.

This is particularly borne out by the events and opinions of the Louisiana Supreme Court in the case of *State* v. *Chianelli*, 226 La. 552, 76 So. 2d. 727.

In this case a motion to quash the *petit* jury venire was filed five days before his trial but more than three days following the *beginning* of the petit jury term. Despite the ruling of the court in the *Wilson* case to the effect that L.R.S. 15:202 applied to petit juries as well as Grand Juries, and the three day limitation of this article applied to the end of the term rather than the beginning, the District Attorney for the Parish of Orleans envoked the provisions of that Article and filed a demurrer to the defendant's motion to quash on the grounds that it had not been filed within the first three days from the *beginning* of the petit jury term.

The trial judge sustained the state's demurrer and overruled the defendant's motion to quash.

On appeal to the Louisiana Supreme Court, the court of their decision in the *Wilson* case had this to say:

> "We concede that this court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to have been judicial legislation rather than judicial interpretation". . .
>
> "We are conscious of the fact that under the interpretation given to Article 202 by the Wilson case and others following it an accused can indefinitely delay the trial of his case by waiting until the date fixed for trial to object to the petit jury array or venire. However, to avoid these unnecessary delays, Article 202 of the Code

of Criminal Procedure requires legislative, not judicial, action. . ."

Your petitioner requests that this Honorable Court also consider the following:

1. In *State* v. *Wilson, supra*, the *stare decisis* case on the subject matter in Louisiana, the then Chief Justice of the Louisiana Supreme Court vigorously dissented and opposed the decision of the majority of the Court. Your petitioner would like to make the Chief Justice's dissenting opinion part of his brief and presentation to this Honorable Court.

2. Shortly after the *Wilson* case was decided the fallacy of the decision was noted in 18 Tulane Law Review 462, where at p. 481, the author had this to say:

> "The confusion surrounding the meaning of Article 202, the extent of its application and its relation to other articles of the Code can be traced to one primary cause—the ambiguous language of the Code. By attempting to treat grand and petit juries alike, applying the same limit to each, the legislature created a problem even under the early statutes when the grand jury was drawn along with the petit juries on the first day of the term of court. Today when grand jury terms and court terms do not coincide, the language of Article 202 falls far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the supreme

court. *In its present ambiguous form this Article is one source of confusing technicalities of procedure in criminal cases which can be used as a means of side-tracking the issue of race discrimination in the selecting of juries.* (Emphasis added)

3. In 14 Louisiana Law Review 11, at page 19, Professor Dale Bennett, Professor of Criminal Law at Louisiana State University had this to say:

"The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions. Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits". Even more latitude is apparently contemplated by the declaration in Article 253 that objections to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit". In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202, certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to

plead otherwise. In such cases Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the merits. While Article 253 authorizes the judge to permit the filing of a motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combination of Articles 284 and 287 would effect such clarification. At any rate, Article 202 should be eased out of the picture in this regard."

4. After the *Chianelli* case, *supra*, was decided, this question was again reviewed by the Law Review writers, who, in 15 Louisiana Law Review, 749, p. 754, said:

"However, it is submitted that the court in the *Wilson* case was guilty of judicial legislation".

IN THE ALTERNATIVE, it must be pointed out to this Honorable Court the fact that even though there may be some question as to whether L. R. S. 15:202 was meant to apply to Grand Juries as well as Petit Juries, the Supreme Court of the State of Louisiana has consistently held, even in the case of *State of Louisiana* v. *Chianelli*, *supra*, that the said Article 202 did apply to both Grand Juries and Petit Juries.

To quote the Supreme Court of Louisiana in the *Chianelli* case, it is admitted

> "*We concede that this court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to have been judicial legislation rather than judicial interpretation.*" (Emphasis added).

We agree that the Supreme Court of the State of Louisiana's opinion in that, in construing or interpreting Article 202 in the *Wilson* case, its interpretation was "*somewhat strained*" when it interpreted the words

> ". . . must be filed . . . before the expiration of the third judicial day of the term for which said jury shall have been drawn . . ."

to mean

> ". . . must be filed . . . before the expiration of the third judicial day following the expiration of the term for which said jury shall have been drawn . . ."

We must state as a simple proposition that Article 202 may be applied to Grand Juries as well as Petit Juries. When an impossible situation occurs, such as a crime occurring after the third judicial day of the term of the Grand Jury and a defendant wishes to file a motion to quash on the ground that the Grand Jury which indicted him was impanelled in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, and the Civil Rights act enacted in pursuance thereof, he may do so under the authority granted by L. R. S. 15:284, L. R. S. 15:286 and L. R. S. 15:287, which read as follows:

> "L. R. S. 15:284 TIME AND METHOD OF TAKING OBJECTIONS TO INDICTMENT: AMENDMENT OF INDICTMENT.

Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared."

"L. R. S. 15:286. DEFECTS IN INDICTMENTS SET UP IN MOTION TO QUASH. Any defect apparent upon the face of the indictment, *or any defect fatal to the validity of the proceedings* may be set up in a motion to quash the indictment, whether such fatal defect be one apparent upon the face of the record, *or be such as can be established only by the production of evidence.*" (Emphasis added)

"L. R. S. 15:287. DEMURRER AND MOTION TO QUASH; FORM AND SPECIFICATIONS; TIME FOR DISPOSITION. Both the demurrer and the motion to quash must be in writing, must specify the grounds upon which based *and must be filed, tried and disposed of before trial on the merits.*" (Emphasis added)

These three articles, L. R. S. 15:284, L. R. S. 15:286, and L. R. S. 15:287, all apply to Grand Juries and not Petit Juries. L. R. S. 15:284 states that "Every objection to any indictment . . ." must be brought within a certain time, etc. Grand Juries only can return indictments; therefore this article does not apply to petit juries. Articles 286 (L. R. S. 15:286) and 287 (L. R. S. 15:287) also refer to defects in the indictment or any defects fatal to the validity of the proceedings which may be set up in a motion to quash the indictment and provides that all motions to quash the indictment must be filed, tried, and disposed of before trial on the merits. Therefore, articles 286 and 287 also apply to Grand Juries and not Petit Juries.

It is submitted that these articles (284, 286 and 287) must be used whenever special circumstances render the use of article 202 impossible because of time limitation or passage.

Article 202 would apply to Grand Juries only during the first three day of the terms of said Juries. After the first three days of the term of the Grand Jury, defendant would resort to the provisions of Articles 284, 286 and 287 in attacking an indictment returned by said Grand Jury. We submit that, in the instant case, defendant could have filed his motion to quash before arraignment under Article 284, which was done by defendant; and could have had his motion to quash tried and disposed of, after establishing the facts in support of his motion to quash by production of evidence (which was also denied defendant) before trial on the merits, in compliance with Articles 286 and 287, all of which was denied defendant herein.

The then Chief Justice of the Supreme Court of Louisiana, the Honorable Charles J. O'Neill, in his dissenting opinion in the case of *State* v. *Wilson*, *supra*, in support of his opinion that the language of Aricle 202 means the first three judicial days of the term of the jury, quoted the case of *State* v. *Smothers*, 168 La. 1099, 123 So. 781, which stated, in part:

> "Bill No. 2 was reserved to the overruling of a motion to quash the petit jury venire. This motion is based upon the same grounds alleged in the motion to quash the indictment. The trial judge's reason for overruling this motion is because it was not filed timely, as provided by Article 202 of the Code of Criminal Procedure. For this and the reasons we have given in our consideration of bill No. 1, the ruling, complained of in this bill, is correct."

> "In this case, the indictment was returned into court before the criminal term at which the trial was

had begun (began). We think Article 202, Code Cr. Proc., applies to such a case: *Whether or not it can be held to apply to indictments returned during "the progress of a criminal term is a question which we are not now called upon to decide. It seems, however, that Article 287, Code Cr. Proc., might be invoked in a case of that kind."* (Emphasis added)

It is submitted that the Supreme Court of the State of Louisiana, in construing and interpreting L. R. S. 15:202 in the *Wilson* case and in the *Michel* case, *supra*, herein being considered by your Honors, and in overruling defendant's motion to quash, based on said *Wilson* case, deprived defendant of his rights to equal protection of the laws and the right to have a Grand Jury impanelled where citizens possessing all other qualifications were disqualified for service as grand Jurors on account of race, color, or previous condition of servitude. These rights were denied to petitioner herein in violation of the Fourteenth Amendment of the Constitution of the United States and the Civil Rights Act, being 18 Stat. 336, U. S. C. Paragraph 44, and the judgment of the Supreme Court of Louisiana, confirming the judgment of the Criminal District Court for the Parish of Orleans, should be annulled and set aside and a new trial ordered.

Summary and Conclusion

In view of all of the above, it is submitted that error was committed by the Criminal District Court for the Parish of Orleans (the trial court) in overruling defendant's motion to quash for the reasons that the Grand Jury which returned the indictment was impaneled in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and the Civil Rights Act of the United States Congress which was enacted in pursuance of and for the purpose of carrying out the equal

protection guarantee of said Fourteenth Amendment, being 18 Stat. 336; 8 U.S.C., Paragraph 44.

The Supreme Court of Louisiana, in upholding and affirming the action of the District Court, relying on the unconstitutional and unreasonable construction and interpretation placed upon L.R.S. 15:202 in the case of *State* v. *Wilson*, *supra*, denied defendant of the equal protection clause because it denied him the right of proving a prima facie case of systematic exclusion of negroes from Grand Juries in the Parish of Orleans.

That the United States Supreme Court has determined on many occasions that notorious and undisputed facts of discrimination in qualification of jurors, such as is shown herein and in the transcript filed with this Honorable Court, make out a prima facie case against the constitutionality of the Grand Jury which indicted defendant herein, and that by its unreasonable and unwarranted interpretation of L.R.S. 15:202 in the case of *State* v. *Wilson*, the Supreme Court of the State of Louisiana, deprived defendant of his right to the equal protection of the laws of the State of Louisiana, and of the United States and establishes the nullity of the indictment upon which defendant has been tried and convicted, and his right to make out a prima facie case against the constitutionality of the Grand Jury which indicted defendant by depriving him of his right to put into the record evidence which would have proved the aforesaid undisputed and notorious facts.

It is submitted that defendant is entitled to have the judgment of the Supreme Court of the State of Louisiana, affirming the judgment of the Criminal District Court for the Parish of Orleans, set aside and annulled, and that defendant is entitled to a new trial which should be ordered by this Honorable Court in order to assure defendant of his rights which are guaranteed under the 14th Amend-

ment of the Constitution of the United States and the Civil Rights Act of the United States Congress enacted in pursuance thereto.

Respectfully sbmitted,

GERARD H. SCHREIBER,
Counsel for Petitioner.
GEORGE H. FUST,
Counsel for Petitioner.

Certificate

I hereby certify that a copy of this brief has been served on opposing counsel on this the 23rd day of August 1955.

GEORGE H. FUST.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

LOUISIANA REVISED STATUTES OF 1950:

Title 14, Section 42. Aggravated Rape

"Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where the female resists the act to the utmost, but her resistance is overcome by force.

(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense."

Title 15, Section 202. Time for Urging Objections to Array; Waiver

"All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

Title 15, Section 284. Time and Method of Taking Objections to Indictment; Amendment of Indictment

"Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared".

Title 15, Section 286. Defects in Indictments set up in Motion to Quash

"Any defect apparent upon the fact of the indictment, or any defect fatal to the validity of the proceedings may be set up in a motion to quash the indictment, whether such fatal defect be one apparent upon the face of the record, or be such as can be established only by the production of evidence."

Title 15. Section 287. Demurrer and Motion to Quash; Form and Specifications; Time for Disposition

"Both the demurrer and the motion to quash must be in writing, must specify the grounds upon which based and must be filed, tried and disposed of before trial on the merits.

LOUISIANA CONSTITUTION:

Article II, Section 1. Departments of Government

"The powers of the government of the State of Louisiana shall be divided into three distinct departments—legislative, executive, and judicial."

Article II, Section 2. Separation of Departments; Powers

"No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Article I, Section 9. Criminal Prosecutions; Speedy Public Trial; Jury; Venue; Witnesses; Counsel; Indictment and Information; Double Jeopardy

"In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury or by a jury less than twelve in number, as provided elsewhere in this Constitution; provided further, that all trials shall take place in the Parish in which the offense was committed, unless the venue be changed; provided further, that the Legislature may provide for the venue and prosecution of offenses committed within one hundred feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the militia when

in actual service in time of war or public danger; nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."

Article I, Section 2. Due Process; Expropriation of Private Property for Public Purposes; Just Compensation

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid".

UNITED STATES CONSTITUTION:

Amendment XIV, Section 1. Citizens of United States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

UNITED STATES CODE ANNOTATED:

Title 18, Section 243: Exclusion of Jurors on Account of Race or Color

"No citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

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